

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

OCT 17 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0065-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
ERNEST JAMES GRIMM,)	Not for Publication
)	Rule 111, Rules of
Petitioner.)	the Supreme Court
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051345

Honorable Charles S. Sabalos, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Ernest James Grimm

Safford
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Ernest Grimm was indicted on charges of offering to sell and/or transport cocaine, possessing cocaine for sale, and conspiring to possess and sell cocaine and/or marijuana. Pursuant to a plea agreement, he pled guilty to a single count of possession of a narcotic drug for sale and admitted having one prior, historical felony conviction. The

trial court sentenced him to a partially mitigated, 7.5-year term of imprisonment. Grimm filed a timely notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and the court appointed counsel to represent him in the post-conviction proceedings. Counsel, however, filed a notice stating she could find “no issues of merit” to raise, and Grimm filed a petition for post-conviction relief pro se. *See Montgomery v. Sheldon*, 181 Ariz. 256, 260, 889 P.2d 614, 618 (1995). He challenges the court’s summary dismissal of that petition. We grant review to determine whether the trial court abused its discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). Finding no abuse of discretion, we deny relief.

¶2 In his petition for post-conviction relief, Grimm suggested his plea was involuntarily and/or unknowingly made. He asserted he had “entered his plea agreement without being informed of his right to a jury determination of aggravating factors,” had had an “incomplete understanding of the charge” against him, and “the plea bargaining agreement was illegally coercive.” He also asserted the trial court abused its discretion in imposing sentence and that his sentence constituted “cruel and unusual punishment.” Finally, Grimm asserted a claim of ineffective assistance of trial counsel, arguing counsel should have filed a motion pursuant to Rule 12.9, Ariz. R. Crim. P., challenging the grand jury proceedings and implying counsel had performed deficiently in investigating the case and at sentencing. To the extent Grimm attempts to raise these same issues in his petition for review, we find no abuse of discretion in the trial court’s ruling.¹ The court ruled that Grimm had presented no

¹Grimm attempts to raise numerous other issues in his petition for review; however, because he may not raise issues in a petition for review that were not decided by the trial court, *see* Rule 32.9(c)(1)(ii), Ariz. R. Crim. P., we do not address them.

material issue of fact or law that entitled him to relief. *See* Ariz. R. Crim. P. 32.6(c). We agree.

¶3 At the change-of-plea hearing, the trial court addressed Grimm directly before finding his “pleas and admissions [were] knowingly, intelligently and voluntarily made.” *See* Ariz. R. Crim. P. 17.3. The court described the terms of the plea agreement, and Grimm responded affirmatively when asked whether he understood the agreement, its consequences, and the charge to which the agreement required he plead guilty. The court further explained Grimm’s trial rights, including his right to have a jury determine the existence of aggravating circumstances, and Grimm stated he understood his rights. He denied that anyone had made any commitments to him or promises about his sentencing other than what was contained in the plea agreement and what was discussed in open court. Thus the record shows the plea “was voluntarily made with an understanding of the nature of the charges and the consequences of the plea.” *State v. Miller*, 110 Ariz. 304, 306, 518 P.2d 127, 129 (1974). Grimm presented nothing in his petition for post-conviction relief to contradict that record.

¶4 Post-conviction relief is appropriate if a sentence violates the United States or Arizona Constitutions, “exceed[s] the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law.” Ariz. R. Crim P. 32.1(a), (c). Grimm’s plea agreement provided a possible sentencing range of six to 9.25 years, corresponding to the mitigated through the presumptive statutory range for Grimm’s offense. *See* A.R.S. §§ 13-604(B), 13-3408(A)(2), (B)(2). The court’s imposition of a 7.5-year term of imprisonment, less than half the maximum term authorized by law, *see* § 13-604(B), did not exceed the provisions of the agreement. Nor is the sentence “grossly disproportionate” to

Grimm's offense; thus, it does not constitute cruel and unusual punishment under either the federal or Arizona constitutions. *See State v. Davis*, 206 Ariz. 377, ¶ 34, 79 P.3d 64, 71 (2003).

¶5 “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). “Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim.” *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. Grimm presented no information in his petition for post-conviction relief supporting either that counsel's performance had been deficient or resulting prejudice.

¶6 Grimm argued that his counsel had failed to file a motion for a new finding of probable cause pursuant to Rule 12.9, “after requesting [an] extension of time to do so.” But Grimm provided no information establishing there were grounds for such a motion other than his own, unsupported assertion that the detective who testified before the grand jury had made “misstatements” or perjured himself. And, the specific statements identified as inaccurate either did not concern the events for which Grimm was indicted or were actually corrected during the detective's testimony. The trial court did not abuse its discretion in finding that Grimm's petition did not present a material issue of fact on this claim. *See Ariz. R. Crim. P. 32.6(c)*.

¶7 Grimm's suggestions that counsel performed deficiently at sentencing and during his investigation of the case are equally unsupported. Moreover, Grimm did not

allege that, had counsel performed differently, he would not have accepted the plea agreement. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68, *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (“A colorable claim is ‘one that, if the allegations are true, might have changed the outcome.’”).

¶8 We find no abuse of discretion in the trial court’s summary dismissal of Grimm’s petition for post-conviction relief. Thus, although we grant review, we deny relief.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge